United States District Court

for the Southern District of California

OBESITY RESEARCH INSTITUTE, LLC, Plaintiff, v. FIBER RESEARCH INTERNATIONAL, LLC, Defendant.	)	No. 15-CV-595-BAS October 27, 2015 San Diego, California

Transcript of Motion Hearing
BEFORE THE HONORABLE MITCHELL D. DEMBIN
United States Magistrate Judge

APPEARANCES:

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THE CLERK: Calling matter 1 on the calendar, case number 15-CV-595-BAS-MTB, Obesity Research Institute, LLC, versus Fiber Research International, LLC, et al.

THE COURT: Can I have the appearances, plaintiffs first.

MR. FLAHERTY: Good morning, Your Honor. Sean Flaherty on behalf of the plaintiff Obesity Research Institute.

THE COURT: Thank you.

MS. ABELN: Amanda Abeln on behalf of Obesity.

THE COURT: Thank you.

MR. FITZGERALD: Good morning, Your Honor. Jack Fitzgerald on behalf of Fiber Research.

THE COURT: Thank you.

MS. PERSINGER: Good morning, Your Honor. Melanie Persinger on behalf of Fiber Research.

THE COURT: Thanks. So I brought you in -- I decided not to do this one on the papers originally because I was confused, and then once my confusion abated, I thought I'd bring you in anyway and say hello.

And the reason I realized I got confused was because the dispute is backwards it seems to me, and that really for whatever reason I struggled with that because, of course, it is Obesity -- it's Obesity that has the -- you know, the punitive

defense of laches, all right, but it is the defendant that is seeking discovery regarding that issue.

So -- and I found that -- I just -- I just found -- I had to kind of wrap my head around it because basically the discovery that's being sought by Fiber potentially supports the claim of laches, and Obesity is fighting against that discovery that presumably is to Obesity's benefit even though they're not the one taking discovery, which means they're not paying for it other than lawyer time.

So that just kind of for whatever reason -- that struck me as odd, and I really had a hard time getting around it, but I finally did get around it because it is true that in the first amended counterclaims, Fiber does make assertions regarding when Obesity did things beginning back in '06/'07. Of course, it doesn't mean that Fiber or Shimizu knew that back in '06/'07, which I think is the argument Obesity is making in the motion to dismiss, but that's not for me, and that's neither here nor there, but the point ultimately I realized is that these allegations were made, these claims were made in the amended counterclaims by Fiber, and they have a right to discovery to support their claims. Certainly Obesity has raised the issue of laches in the context of the motion to dismiss, but, honestly, it didn't even have to. Under Ninth Circuit there's a presumption of laches when based on the claim itself. It looks like something goes back in time, so the

amended counterclaims themselves by making allegations about things started to happen, the '06/'07 and beyond time frame, the presumption of laches is there already, and the consequence of that, it seems to be a legitimately discoverable topic.

As I say, that confused me because I expected Obesity to be pursuing that line of discovery, and maybe they just beat them to it, but, again, it just seemed bizarre to me.

So with that backdrop, it does seem that there is discovery that -- that is legitimate and relevant for both sides regarding the issue of laches. I think, as I say, it's odd that it is the defendant seeking the discovery that makes -- vindicate plaintiff's position, but that's on the one hand. On the other hand, it could serve to vindicate Fiber's position that there have been false statements about Obesity's product.

So with that, to the extent that information has been withheld, and I'm going to go through them individually, each of the ones, but as a general matter, and I'll get into individual relevance concerns as we go forward, but as a general matter, to the extent that it is relevant, the notion that discovery cannot be had back to '06, I'm going to overrule those objections. So as a general principle.

Does anybody want to be heard on that before we go forward into the individual interrogatories and RFPs at issue? I'm happy to hear whatever argument you may have. You can go

ahead and snatch defeat from the jaws of victory if you like.

MR. FLAHERTY: Yes, Your Honor, if I may be heard.

THE COURT: Sure. Of course. That's why we're here.

MR. FLAHERTY: The issue with the laches defense is not so much one about what Obesity knew, it's one about what Shimizu knew.

THE COURT: Correct.

MR. FLAHERTY: And as a result, we don't think the statute as to Obesity should be going back ten years. If they want to discover --

THE COURT: The point of it to me that kind of turned me around, if you will, was the notion that in their first amended counterclaims they make allegations about things that Obesity did that are -- that are claims, amended counterclaims, and they have the right to discover evidence regarding their claims, their allegations.

MR. FLAHERTY: When the allegations for those actions fall specifically outside what would be the imported statute of limitations under the claims that this makes.

THE COURT: So you're arguing it would be relevant if you were asking the nonrelevant --

MR. FLAHERTY: Absolutely.

THE COURT: No, it doesn't work that way. Relevance is a two-way street.

MR. FLAHERTY: Understood. I mean that's the

argument.

THE COURT: Happy to discuss it. That's why I'm here.

MR. FLAHERTY: Understood. That is the argument, Your Honor.

THE COURT: All right.

MR. FLAHERTY: I think that we would be able to propound that discovery to defend ourselves.

THE COURT: To affirmatively -- that's why I got confused. Because you certainly could have, and they could have affirmatively seek discovery to support the defense of laches. The fact that the defendant sort of preempted that doesn't make it any less relevant because laches is in the case.

MR. FLAHERTY: Understood.

THE COURT: I mean unless you were going to stand up and say we affirmatively disavow any defense based on laches, honestly I'd have to reconsider.

MR. FLAHERTY: No, we're not --

THE COURT: Okay. And that's fine. Because that would change the game.

MR. FLAHERTY: I understand.

THE COURT: That would change it to whatever the applicable statute of limitations period is.

MR. FLAHERTY: Understood.

THE COURT: But as long as laches remains viable,

anyone can discover it because you can discover about claims and defenses.

MR. FLAHERTY: Okay.

THE COURT: It's not a -- it is a two-way street.

MR. FLAHERTY: Understood.

THE COURT: All right.

MR. FITZGERALD: At the risk of --

THE COURT: Go ahead, I dare you.

MR. FITZGERALD: I appreciate --

THE COURT: Stand up.

MR. FITZGERALD: Yes, I appreciate you looking out for me. I'll just make two quick points. One is that --

THE COURT: I'm looking out for you?

MR. FITZGERALD: By suggesting that I not snatch victory from the jaws of defeat, from the jaws of victory, as you said, but just to make two points. By way of explanation with respect to some of the confusion you mentioned, number one is Obesity Research has produced selective documents from 2004 through 2006, the documents that they think support their case for laches while obscuring other information from that time period. So that's one of the reasons. And I've got some of those documents here. I'm happy to get them up, but that's one point to make.

And the second point is that there is a defense to the defense of laches, which is that the party asserting the

defense of laches comes with unclean hands, and so that would be relevant. That's all I have to say, Your Honor.

THE COURT: Yeah, it's not enough for me to say that you have, in fact, snatched defeat from the jaws of this -- of this limited victory.

So as a consequence, let me -- let's go through the individual interrogatories and RFPs that are at issue, and I'll go ahead and rule on them, and we'll move forward from there.

Before I do that, let me also say that it is concerning to me that we've had this flurry of discovery disputes all brought on October 5. I know that these discovery disputes predated the arrival of new counsel, and they were, you know, I think granted a motion to bring them late, but it -- it is actually the rare case that we -- that we have this flurry of activity. It suggests that there has been a bit of a breakdown in communication in terms of the meet and confer process. I do need you to redouble your efforts in that regard.

I will say that it's only a very short period of time from now before the new federal rules go into effect. I am quite conversant with them, and I intend to enforce them. And I'll say this: Specifically with regard to Rule 34, which changes the game, I think, dramatically in terms of discovery practice regarding requests for production of documents, you know, December 1, and I'm actually of a mind to enforce it

sooner. While one can certainly interpose objections, one must otherwise disclose what they have, and one must identify what they are withholding based upon which objection. I think it kills -- I'm hoping -- actually I'm cautiously hopeful, although it probably won't happen, that it kills the boilerplate objection with regard to request for production, and will really sharpen discovery practice in that regard.

So going forward, I'm hoping that the type of dispute we're seeing on the RFPs, here at least, will fall by the wayside, and if not, the dispute will be much more sharpened because you'll have to say what you're withholding based on what objection, which, as I say, hopefully will change things. So I just want to put you on notice that I'm going to be doing that.

MR. FITZGERALD: Thank you, Your Honor.

THE COURT: Don't thank me now. You might be on the other end of that stick.

All right. So with regard to the matters in dispute, interrogatory number 1 was manufacturers of the product. Now that I've ruled that this is open into '06 -- you've asked for ten years, it's really nine, but this '06 was the first allegation that I saw in the first amended counterclaims. That's the year, so I'm going to hold you to '06, and I think that this is relevant on the issue of both of the Lanham Act as well as -- as well as the issue of laches.

MR. FITZGERALD: May I briefly address the time period, Your Honor?

THE COURT: I'm really --

MR. FITZGERALD: Well, the only reason is that the letters -- they had a product called Propylene before they sort of renamed it to Lipozene, which was 2006, but the facts surrounding Propylene and the Katz study Propylene, there are letters from 2004, 2005 that they're relying on for their laches defense, so I'm not sure the manufacturer would be different between '05 and '06, but that is one.

THE COURT: I'm going to stick with the '06, and as we go forward, I'm also just to be clear, I'm sticking with Lipozene.

MR. FLAHERTY: Your Honor, would Your Honor consider the last three years given the -- our allegations or our arguments as to the appropriate statute of limitations as well as, say, a year on either side of '06? It just becomes very, very burdensome to go back through ten years of documents.

THE COURT: Well, yes and no. The issue for you is I think you're arguing against your own interests. If that's what you want to do, that's fine, but your defense of laches is -- suggests at least what was said in the motion to dismiss, you need to show that the defendant was on notice that you were using a particular formulation of this product back well before the statute of limitations period, and they know it, and you're

prejudiced by going forward.

If I cut off the discovery, I'll cut it off both ways, but you're never going to get that. So, again, I see this as a two-way street. This evidence -- I mean you remember, this isn't a game. I mean the evidence is the evidence. Whatever it is it is. The claims and defenses are what they are. Though they can be modified going forward, right now there's a claim on the table. There's a presumption of laches based upon the way I read the Ninth Circuit law because of the first amended counterclaims. It's your burden to prove it, and you're suggesting to me that I not allow the evidence that supports your defense to be exposed.

MR. FLAHERTY: I understand it may seem odd. My effort is not to preclude our own defense or to prevent discovery on relevant information. My effort is to try and creatively and collaboratively in a way that would make the discovery not so burdensome such that --

THE COURT: Well, I don't know how burdensome it is because I haven't received a showing. I mean if -- I don't know what document you would -- you may already know the extent of the discovery I am opening up. I don't know that something like identifying your manufacturers can be burdensome.

MR. FLAHERTY: Understood.

THE COURT: As we go forward, perhaps there are things that you're going to make that suggestion, but it's not enough

to say so. It requires proof that is this tranche of data, it's in legacy format, it's going to cost us more than this case is worth to find it. You know, give me a declaration. Let it be challenged, and I can deal with it. But just the fact that this is covering the period of time doesn't necessarily make it unduly burdensome, particularly when it seems to me that this is going to potentially support your defense. So it's a weird argument that you're making. Do you see my point?

MR. FLAHERTY: I see your point 100 percent. I just -- I believe that time and scope are kind of on a continuum, and if we're going to go back in time forever, then the scope should be very --

THE COURT: And, as I say, I'm going to limit the scope when we get to them to Lipozene anyway.

MR. FLAHERTY: Okay.

THE COURT: It does help. I think this case is about Lipozene.

MR. FLAHERTY: Correct.

THE COURT: But -- all right. So let's -- I have a ruling on interrogatory number 1.

2 is basically a spinoff of the same thing. This will be any source of the ingredients contained in the Lipozene product again going back nine years. I think it goes to the heart of the laches defense as well as ultimately within the

statute of limitations period to both the declaratory judgment action by the plaintiffs as well as the counterclaims by the defendants.

I look at 3 the same way. 4 I'm going to grant the objections or sustain the objections. It's a contention interrogatory, which are generally disfavored. I know that they are legal, but they are disfavored, and this one, it seems to me, goes to the heart of what the expert testimony is going to be. The consequence of that is -- it's just not an appropriate contention interrogatory when it will be the subject, clearly be the subject, of expert testimony, so I'm going to not enforce interrogatory number 4.

Interrogatory number 5, which is basically identifying everyone who ever had anything to do with Lipozene, no, it's overbroad. I'm not going to rewrite it for you.

Similarly number 6, all corporate officers, I don't see how that helps. It's overbroad. Kill that one off. I'm not going to rewrite it.

And I'd note that when I say that, that there has been a response at least for the folks during the statute of limitations period, that's good enough. We're just not going to go back in time because I don't really see the relevance to the laches defense with regard to that information.

Number 9 is a little different. First date of sale Lipozene product in the U.S. and total annual retail sales. I

know I'm summarizing to some extent. I don't think exposing the first date of sale of the Lipozene product in the U.S. is burdensome, so I'm going to enforce that part.

Total annual retail sales only during the statute of limitations period regarding the Lanham Act, and the Lanham Act statute is three years.

MR. FLAHERTY: May I speak to that point, Your Honor?

THE COURT: Sure.

MR. FLAHERTY: I don't believe that the first amended counterclaim puts our or Obesity's retail sales in issue.

THE COURT: Well, the Lanham Act is claimed in the first amended counterclaim, is it not?

MR. FLAHERTY: It is alleged.

THE COURT: And the Lanham Act includes damages. I appreciate the California statutes are restitution and injunctive relief, but Lanham Act has a damage component.

MR. FLAHERTY: Correct, but the damage component on the Lanham Act, as I understand it, is defendant's lost profits, not in this case the counter-claimant's lost profits, not the defendant's gain profits.

THE COURT: And the question there is about the sales because they're not asking for your profit. They're asking for sales, and the -- well, you can make your own argument if you like. I would see -- view the argument as there's certainly circumstantial evidence.

MR. FLAHERTY: Well, my alternate proposal would be that if they stand in the shoes of Shimizu, the alleged manufacturer, by some sort of purported assignment or distribution right, then they are presumptively importing or selling this granulated powder by the kilo, not -- they are not competitors in so far as that is concerned. They are concerned about how we have purchased the raw supply.

THE COURT: And that is a great argument regarding the admissibility of this information down the road and whether it is actually a true measure of damage. But I don't think it's an argument that I can adopt in terms of preventing discovery.

MR. FLAHERTY: Okay. The alternative was effectively that in our buying practices as opposed to our selling practices, how much would we have theoretically bought from you as opposed to how much did we sell at Walmart or GNC.

THE COURT: This is total annual retail sales. It's not who you sold to, it's just a number. It's a financial number. This is our total annual retail sales of Lipozene.

MR. FLAHERTY: Understood. The concern is this.

THE COURT: To me this is a gross number, it's not a micro number. I would tend to agree with you on a microanalysis of that. I don't think it's valid, but with regard to whether it has a potentially bearing on a damage calculation, considering how broad I'm supposed to interpret discovery, I think it's there, although I appreciate

the -- your next level argument, but here this is gross information.

MR. FLAHERTY: I understand it's gross information. I just don't think they pled -- the claims as pled put that in issue.

THE COURT: And -- okay. Fair enough.

MR. FITZGERALD: Your Honor, I don't think I need to make an argument, but under 1117, this is relevant to damages under the Lanham Act.

THE COURT: Yeah, I thought so.

10 is identifiable versions of the products sold by SKU. I don't know what SKU does for you. I am going to limit this to Lipozene anyway, and I'm just not sure how this plays.

MR. FITZGERALD: It's mostly sort of context, background facts, but we need to know did they sell it in 60 capsules, 120 capsules, 30 capsules? Did they sell a two pack? Did they sell one? It's basically the different ways they sell it. It goes to damages, the way we qualify our damages. I think in addition, it can be burdensome.

THE COURT: The relevance of this is a little more afield, but regarding the burdensome, I agree it's just a list. I don't think that should be hard to deliver. If this turned out to be a real problem, I would view it differently, but, again, it's not -- this is not the kind granular information like who did you sell -- who are your customers for each

version of SKU. You're never going to get that. Just understand. But just this is how we sold it. I don't see the harm.

MR. FITZGERALD: Thank you, Your Honor.

THE COURT: Don't thank me. Don't you thank me.

All right. That gets us to the RFPs.

MR. FITZGERALD: Your Honor, just for clarity sake, I had number 7 -- and 11 as well.

THE COURT: I'll need to add that.

MR. FITZGERALD: For number 7 --

THE COURT: Oh, I'm sorry. Every employee for the past ten years with any involvement with any group, company? No.

MR. FITZGERALD: Yeah, I thought that was number 5. I realize --

THE COURT: 7 it's -- no, I find that overbroad.

MR. FITZGERALD: Okay. I realize it's similar and it's overbroad. What we're really looking for are the people that made the marketing decisions and assessed the validity of the products, but okay.

THE COURT: Nope. Okay. That gets us to the RFPs, right?

MR. FITZGERALD: There was a wrong number 11 as well, but it was sort of a --

THE COURT: I must have flipped a page that I

shouldn't have flipped. Oh, there it is. Yeah, yeah, yeah, yeah.

MR. FITZGERALD: Basically just to avoid surprise and collusion type of thing, if they know anybody who has relevant information.

THE COURT: No, no, no, I mean that is -- all that is is a replay of Rule 26(a). They had an initial disclosure obligation, and I'm sure they've taken that seriously, and it's a far more serious sanction than not -- number 5 is information required by 26(a), so no.

Then that gets us to the RFPs.

The certificates analysis of similar documents, yeah, I -- as we talked about it, I agree that the period of time is back to '06, but it's Lipozene only. It's not any product, any glucosamine product. I'm saying that wrong, right? Glucomannan. I had another case on Friday with glucosamine, and I thought you've got to be kidding. It's a test.

RFP 2 is very similar test analysis, quality assurance reports. Again, the time period I think is '06, and it's Lipozene only.

3, all communications related to Lipozene since '06. No. That's overbroad by anybody's definition. I'm not going to rewrite it.

MR. FITZGERALD: Your Honor, we did narrow it. That was in the motion. You think it's still overbroad with the

topics?

THE COURT: It is overbroad, yeah. You have other RFPs that cover what I think to be far more relevant areas of inquiry, but just all communications, no. And almost -- that will almost never fly in any case ever just to be clear.

Now, for example, communication with Shimizu related to Lipozene. Yeah. Absolutely. And, again, the period going back to '06.

5 is studies, expert report, scientific evidence substantiate that supports advertising claims. Yeah, I see that.

Again, '06, Lipozene only.

Anybody can jump up when I'm really offending them because I didn't intend to bring you in here and just read an order. I'm open to discussion just to be clear. Maybe I haven't made that clear.

MR. FITZGERALD: I'm holding my tongue.

MR. FLAHERTY: Your Honor, it's a two-edged sword. Lipozene, just as Propylene, is a trademark product, and so when we're talking about a -- the allegations about what is Lipozene, and they only mention Lipozene being marketed under some false advertising, and indeed they only relate to Lipozene, but the predecessor products admittedly are very similar if not identical and marketed under a different trademark, and thus if we -- if we exclude their claims because

they don't apply to Propylene, they don't apply to whatever the predecessor product was that was -- at that point the supplier for the product was -- or the -- with Shimizu. I'm concerned that we run into an issue where we may be in front of Your Honor again when we try and support our defense of laches saying we changed to this product.

MR. FITZGERALD: This product isn't in dispute.

THE COURT: When did Lipozene come into play?

MR. FLAHERTY: I'd have to check. I believe '06 is correct, but I'd have to check.

THE COURT: So if what you're suggesting then is that I should not limit the request to Lipozene and I should allow it to be expanded to all of your glucomannan products because you think that will help you in terms of your laches defense, I'm happy to do that. You're -- it's --

MR. FLAHERTY: It's a difficult question admittedly.

THE COURT: It's a question that you need to answer. I mean, as I say, if I'm in a position here where weirdly it seems that the discovery requests are those that can help you, and yet you want me to limit them on the one hand and now you're suggesting that maybe we shouldn't limit them and we should open them up. I'll do what you like because in the end, this is discovery you have to -- that you have to produce anyway or they -- or you'd be seeking from them any information they have about, you know, their internal knowledge of the

relative merits of your glucomannan products right.

MR. FLAHERTY: Well, I don't think we had a fair opportunity. They just incorporated --

THE COURT: Well, no, I'm looking at Shimizu. I appreciate the notion that there's a dispute regarding Fiber's ability or -- to stand in the shoes of Shimizu. I know there's an agreement at the heart of that and whatever it is, it is. I'm not going to be the one to decide it. I have been looking at Fiber simply as being the password for Shimizu. What we're really talking about is Shimizu. I know that you asked to have Shimizu added as a party which eliminates that whole issue. Again, I'm not sure how that inures to your ultimate advantage, but it's something you decided to do, but I'm looking at this as I believe that it's fair the way I understand what I understand about this relationship is that Shimizu's knowledge is going to be imputed to Fiber. I don't think Fiber's going to fight about that. Well, they might some day. I don't see it considering the position that they're taking. They can't also have a two-edged sword. If they're going to be representing Shimizu's lost sales as their own, then they're also stuck with Shimizu's knowledge, so this is discovery you would get, so why fight it now I guess is -- it gets back to that same question. Do you want me to say yeah, they can have it regarding any of your glucomannan based products?

MR. FLAHERTY: No, absolutely not because I don't

think the --

THE COURT: Then what are you saying?

MR. FLAHERTY: I think that we come to this case from different circumstances, and ours is one in which we had this relationship with Shimizu, not Fiber, ten years ago and even predating, and theirs is one where they came in 2014 or 2015.

THE COURT: But your laches defense is predicated on the notion that Fiber was standing in the shoes of Shimizu. Fiber certainly couldn't have been subject to laches because they didn't exist until recently. So to the extent you're pursuing the laches defense at all, it is based on the notion that Fiber is stuck with Shimizu's knowledge, right?

MR. FLAHERTY: Correct, but the idea of the notion that we'll be able to get that information through Fiber I think is farfetched.

THE COURT: Well, I don't know. I mean that's -- we talked about you weren't in the original discovery meetings that we had, but there was an assurance that Shimizu will be cooperating in this litigation regardless. Whether that's born out or not, I don't know.

And on the other hand, Shimizu may be a party. So we'll deal with that. But it doesn't change the analysis as to if you believe that you're -- assuming for the moment that Shimizu's knowledge is, in fact, imputed to Fiber across the board so that your laches defense has legs against Fiber, which

I would assume you'd want, you're suggesting, it sounds like, that laches defense might be based in part not just on the Lipozene product, but that on predecessor products because they were substantially the same.

MR. FLAHERTY: And that's the fact that I'm not quite sure about.

THE COURT: Well, then that changes the mix. I'll just say for now I'm going to limit it for Lipozene. You have the decision to make, and that's -- perhaps that's something that you can meet and confer about. If your laches claim is going to be based on prior formulations that they're so similar to Lipozene at what they knew about Propylene carries over to Lipozene, then this discovery is fair game, but if you're saying -- I think today you're saying no, I'll deal with that.

MR. FLAHERTY: Correct because I think that's what's in dispute by virtue of the amended counterclaims. I don't think that they have the right to conduct discovery on anything beyond lipozene, but that -- I don't think that should close the door.

THE COURT: They have the right to discovery regarding any defenses.

MR. FLAHERTY: Correct. And it's my hope and my intention that that would only affect Lipozene. I would just need to make sure.

THE COURT: Okay.

MR. FITZGERALD: If I may maybe crystallize a bit, the reason Propylene is relevant, we think, is because there was this study done in 2004 by this guy named Katz, and at the time, 2004, that's two years before Lipozene, it was Propol, and the study was done on Propylene, and at the time they were buying -- it's called Propylene because they were buying Propol from Shimizu, and I've got documents I can show you.

THE COURT: I don't want to see documents.

MR. FITZGERALD: Okay. But what I'm saying is it's not just speculation. We know for a fact that the 2004 Katz study was done on Propylene using Shimizu Propol. Two years later they changed the name to Lipozene, but we don't really know when they started violating. You know, they were still buying some from Shimizu and mixing it with others, and we don't know who the other suppliers are, and we don't really know the time. We know there was probably a study. We know in late 2006, early 2007 they started marketing it as Lipozene, but we don't really know exactly the chronology in that 2004 to 2007 time period. And so I think at least Propylene is relevant because that's why they were buying it from Shimizu for that product. They used that study, citing that study in all their advertisements since 2006 even though it's Propylene. So it's what they're relying on.

THE COURT: Well, yes and no. I mean the case put aside the laches defense for the moment. The case is about

from the plaintiff's side declaratory judgment that the Lipozene product -- that the manner in which the plaintiffs are marketing their Lipozene product is not unfair, is not deceptive, it doesn't impact Fiber, right?

MR. FITZGERALD: Right.

THE COURT: So the case apart from laches is about Lipozene, the Lipozene product. What is its? What are its ingredients? How is it manufactured? How does it compare scientifically, if that's to be the basis of the case --

MR. FITZGERALD: Right.

THE COURT: -- with Shimizu's product.

MR. FITZGERALD: That's fair.

THE COURT: When we start talking about the Propylene predecessor, that only goes to the issue of laches, and right now I'm going to take Obesity at their word that it has nothing to do with laches, and if they change their mind about that, then this information has to be disclosed. Okay.

MR. FITZGERALD: I hear you, Your Honor.

THE COURT: And I shouldn't have another dispute about that. It seems to me that it really is on the Obesity side to say okay. Our laches defense isn't just that they knew about -- that what Lipozene is, that Lipozene is essentially the same as Propylene, and they knew back then what we were saying about it and didn't care, right? So if that's going to be the argument you make ultimately, Propylene is an

open -- you know, is opened up. If you want to open it up today, I can do that, but I -- it looks like you're -- you don't want me to go that far.

MR. FLAHERTY: I don't want you to go that far, absolutely. I guess the question is is if we can chemically show that there is no difference, then what occurred back then is totally irrelevant.

THE COURT: But have you shown that without exposing what was in Propylene.

MR. FLAHERTY: We simply need a sample from Shimizu.

THE COURT: I thought Propylene was your product?

MR. FLAHERTY: I'm speaking of Lipozene and Shimizu. If we had that today, then none of this matters because --

THE COURT: Well, none of this matters is true except you've asserted a laches defense, which does -- I mean all -- of if all we need to do is say this is Shimizu's Propol, this is our Lipozene, let's have our experts look at both and say whether they are substantially the same, if that's the whole case, why are we here fighting?

MR. FITZGERALD: Your Honor, if --

THE COURT: I guess that's -- I mean that's -- I'm trying to figure out this because I'm required to and now we're required to under Rule 1 to move this thing forward in a just, efficient way. If this case can be decided simply based on a scientific analysis, whether you agree on experts or have your

own experts to say Propol versus Lipozene, is it the same or is it not, if that's the case, then why are we messing around with this? Make that the case. I'll put all this off while you decide that issue.

MR. FLAHERTY: The second component to that of determining that is when Shimizu knew it no longer supplied us, so it has been the same since, as you noted, 2006, then what happened with Propylene or any other product again is irrelevant. If it's different --

THE COURT: Well, if it's the same -- it's the same, then the whole laches defense is irrelevant because the claims all fail.

MR. FLAHERTY: Correct.

THE COURT: Everything fails. The only way we -- in that world that we go forward with laches is that if it is a different product.

MR. FLAHERTY: Correct.

THE COURT: That Shimizu was aware of those differences and what you were saying allegedly that it's the same even though it's different, that does, you know -- that's why we're here. This is where this discovery goes. And it's up to you, you know, how you want to spend your client's money. If this is an easy question, here's the product, here's the product, they work or they don't, tell me that, and we'll put off spending all this time and money until you resolve that

question. And if that question is resolved, that it is different, then, of course, it will open up again to when did they know that it was different and that we were saying that they were the same. I'm trying to find a way to get out of this --

MR. FLAHERTY: It sounds like you're suggesting bifurcation where we technically --

THE COURT: No, not bifurcation. Not bifurcation. It's just that if there is, I can stay all these various levels of discovery if I think it is the right thing to do if there is a threshold issue that can determine whether all of this discovery is even necessary, right? So if the question is is our product the same over X period of time to Propol, it's, you know, game over, if that's -- if the experts agree. If they don't agree, then, of course, these other -- these sideshows come into play.

MR. FITZGERALD: I may be able to head it off, Your Honor, because we served on October 16th an expert report from Dr. Thomas Wolever, who is probably the world's leading expert on dietary fibers, started research on it in the '70s. He's looked at testing, and his opinion is they're not the same and the Lipozene is far inferior. We have an expert report.

THE COURT: All right. So it looks like the experts probably are not going to agree.

MR. FLAHERTY: When you break it down, it's not going

to be the exact same substance that's in a pill with the gel capsule.

THE COURT: Yes, and that's for the trier of fact ultimately to figure out, so essentially so take this notion of whether all this is necessary, it looks like it is.

MR. FLAHERTY: We'll meet and confer.

THE COURT: Meet and confer, and you need to decide whether or not it is to your advantage or not to open up the door appropriately.

MR. FLAHERTY: Agreed.

THE COURT: And it may be so. But I'm not going to order it today because -- all right. Where were we?

MR. FLAHERTY: Number 6.

THE COURT: 6, contracts regarding the product, I view that as overbroad, burdensome, and not relevant as to -- since I'm giving you the ingredients, the specs, the formulations, who they might have sold to, I don't think that's Title C that is relevant.

MR. FITZGERALD: If I may briefly be heard on one thing, first of all, I just want to point out that most of this stuff that is done is purchase orders, contracts are done on a purchase order basis, so it's really purchase orders. And those meet specifications.

THE COURT: You're getting those.

MR. FITZGERALD: But what we're not getting is sharing

costs, and under 1117 one of the measures of damages is defined as profits, and then they have to revert to cost to deduct against them, so it's relevant discovery on damages.

THE COURT: And I think that discovery of the contracts themselves is well beyond what you're suggesting, so I'm not going to order it.

Second is advertisements. Yeah, that seems to be well within what the case is about, again, going back to '06.

MR. FLAHERTY: Could I speak to that?

THE COURT: Sure.

MR. FLAHERTY: Every advertisement that Lipozene has ever run would be -- it's -- this would --

THE COURT: Well, I mean it's -- it really -- to the extent you have an advertisement that ran 4,000 times, you only disclosed one. You don't disclose all 4,000, right? It's one ad.

MR. FLAHERTY: Correct.

THE COURT: This is the ads themselves, not where they ran.

MR. FLAHERTY: Correct, the design -- there's a big component to marketing, which is the change you're advertising, as I understand it, keep it fresh, and so it's not as if -- at least to my knowledge today, it's not as if from 2006 to 2015 or even then the long period of time. So in that respect I would ask that plaintiff or counter-claimant identify that. Is

it just those that show the reference to the clinical study? As I understand it, that's the only hook in the counterclaims. Is it every advertisement for Lipozene or is it just the --

THE COURT: That's actually an interesting suggestion because to me that does have some merit.

MR. FITZGERALD: Well, number one, that wouldn't alleviate the burden because they would still have to review all the advertisements. They should put the burden on us.

THE COURT: That's true.

MR. FITZGERALD: But I think it's about more than any one particular advertisement. We don't know what they're saying, but we know that the -- that -- at least we allege that the things we do know, that they were saying so far that we do know, aren't supported by the studies, so what else were they saying? I think that's perfectly reasonable and appropriate.

THE COURT: Here's the bone I'll give you. I think it's relevant, but I agree that it's possible that this could be a burdensome and expensive exercise. I will give you leave to bring this particular issue back before me with support for a claim that it is unduly burdensome, expensive, and the like, and if the defendants still want it, I may have them pay for it.

MR. FITZGERALD: That was going to be my next thing. The specific burden is they haven't made a specific showing.

THE COURT: So I'm not -- I'm finding it relevant

today, so to me it is disclosable. You've suggested that it can be burdensome. I'm going to allow you the opportunity to explore that. You can bring that back to me. And, as I say, if I still consider it -- if I consider its relevance, what do you suggest -- only regarding clinical studies, then that's something we do. If it's otherwise burdensome and the defendants really want it, as I say, the rules allow for me to split costs, and I may do so. Again, something to talk about. I really encourage you to communicate, and you don't have to fight about everything.

MR. FITZGERALD: To make another point, since 2006 we're aware of 14 commercials in ten years, TV commercials, so that's not a lot.

THE COURT: I don't know. All I'm finding is that it appears to be relevant. There's a suggestion that this may be a bigger issue than it appears. They can certainly -- they should raise it with you, and if it remains in dispute, come back, and I can decide its relevance versus that.

MR. FITZGERALD: Could we have a date certain by which they have to make a showing because otherwise if they just say -- the declaration down the road, don't worry about it.

THE COURT: At the end when this order finishes, I will be ordering that the items that I have ordered disclosed be disclosed by a date certain. That triggers this process of a new discovery dispute.

Okay. That gets us to 8, ingredient list, formulations. Again, I'm going to limit it to Lipozene recognizing that you may agree to open it to Propylene at some point and, again, back to '06.

Same with 9, product specs. Again, I'm limiting it to Lipozene back to '06, but you can expand that if you consider it to be a mutual interest.

I see no relevance to 10 to the '05 FTC order. You have to give me something on that.

MR. FITZGERALD: The FTC brought a case based on ORI -- its allegations that ORI was making false or misleading claims about Lipozene, very similar to the merits in this case, and ORI agreed and the FTC sought ORI's maintenance of these records because these are the items that the FTC thinks that we want to determine that are continuing to mislead. We need -- these are the things that get us quickly to be able to make the determination. These are the most important records that they can keep, maintain, and provide us in the future if we want to check up on it, so it seems like --

THE COURT: When you say "us," I mean --

MR. FITZGERALD: The FTC, so the FTC is saying, you know, these A through K, these records if we need to review -- because they have consent where they have continuing obligations to refrain from making misrepresentations and so forth, and the FTC has continuing --

THE COURT: The FTC does. You don't.

MR. FITZGERALD: That's right, but the -- but I'm arguing about the relevance of the documents because if the FTC says they're relevant as to whether ORI is misleading, I think that's a good indication that they're relevant in this case as well. That's the argument.

THE COURT: No, I'm going to deny that.

12 is all documents supporting the defenses, again, that's duplicative of Rule 26(a), so I'm going to not enforce that.

And then customer complaints, I don't view that as relevant.

MR. FITZGERALD: The relevance is mostly the efficacy -- one of the things we allege is a loss of goodwill because we think our stuff is really good and their stuff is really bad, and yet they're selling it as our stuff, so if a consumer complains and says, you know, your stuff is terrible, I took it for a month and didn't lose any weight, that would help establish our losses.

THE COURT: No, I think it's too attenuated. So I'm going to not enforce 13 either.

Okay. I think that I have covered the matters in dispute. I think -- I'm trying to decide whether 14 days is enough time, but I'm -- I don't want to give anybody a heart attack.

MR. FITZGERALD: I just want to also say we've only so far received 300 pages from Obesity Research, and there were certain things like specs and formulations that they didn't object to during the past three years, they'd only objected over the long period, but based on the objection, I think a lot of these we haven't gotten anything. So, you know, I guess I just want to make sure that -- we don't really know what they're withholding, and the production should be completed now I think that this is resolved.

THE COURT: To me it's just a matter of I want to make sure that there's enough time built in to collect data if it hasn't already been collected, discussing whatever outstanding issues there may be and have a production date.

MR. FLAHERTY: Of course we'd like more time, and I think that plays --

THE COURT: We'll deal with that next.

MR. FLAHERTY: All right.

THE COURT: I'll deal with the motion to continue next. To me it's just a matter of how much time is necessary at this point to produce what I've ordered to produce as well as potentially be in a position to tell me that some other production is so burdensome and its relevance so limited that there should be some form of relief whether it's cost shifting or change in the nature of the production. If -- I mean I can go out as far as 30 days, but that's like -- that's the max,

and --

MR. FLAHERTY: 30 days --

THE COURT: -- I won't go beyond that just to be clear. That's it. 30 days is it.

MR. FLAHERTY: -- to produce production or the issues of production or opposing counsel --

THE COURT: Well, here's the thing. What I -- I'll -- I don't want to see on day 30 a motion that you haven't produced anything; that you met and confer on day 28 and couldn't reach agreement. I'm really -- I'm just -- I don't want to play that game. The purpose of the 30 days is to produce these records, and if there is some subset of them that is problematic, you have got to get that back before me promptly.

MR. FITZGERALD: And, Your Honor, is my understanding correct that the only topic on which they're allowed to -- is the advertisement?

THE COURT: The advertisement, and the other issue which I've left for you to decide for now is the issue of Propylene. The plaintiff's arguments are -- I don't mean disrespect, but it's -- you need to decide whether Propylene is relevant to your laches defense or not.

MR. FLAHERTY: With regard to documents that you're going to compel, I would ask that the Court revisit the issue of sales. We have serious concerns, and I don't think it's

with regard to local counsel.

THE COURT: It's a gross number.

MR. FLAHERTY: I understand, but it's a number that we think is going to be used as a strategic mode to decide whether or not they dig in their heels and continue this or whether or not this is essentially a target big enough worth shooting.

THE COURT: It's the same -- that issue is apparent in every case, every business case that we have. It doesn't make it not relevant. I appreciate that, you know, we have a protective order in place, but I appreciate the notion that that issue can have other tactical or strategic components. Nothing we can do about that.

MR. FLAHERTY: But there would be no burden to Fiber if we were to essentially delay that until the motions to dismiss, pending motions, are decided. If we give them the relevant information regarding liability in the meantime and we put off again this issue for another day, there will be no injury or --

THE COURT: What you're talking about is simply delaying the gross figures of your annual sales going back three years.

MR. FLAHERTY: Well, it's my understanding that's the only items that the Court is going to cover.

THE COURT: Yes. Gross sales issued for the last three years, I think that's relevant.

MR. FLAHERTY: I'm not going to -- I appreciate that it can be factored into other decisions, but you know what? To the extent financial condition is relevant to establish whether --

THE COURT: Yes.

MR. FLAHERTY: -- gross sales issued for the last three years --

THE COURT: I think that's relevant. I'm not going to -- I appreciate that it can be -- may factor into other decisions, but you know what? To the extent that financial condition is relevant to decide whether this battle is worth fighting from both sides, that's a fair consideration.

All right. So I'm going to give you 30 days to produce or get the matter back before me in the limited areas that I've allowed for.

That gets to the question of the extent to which I should continue the case management schedule.

I will say that the most compelling reason to delay the schedule is the arrival with new counsel. It was three months of the open discovery period before new counsel came into play. Of course, it's always, you know, the client's decision to change counsel and deal with that issue, but I also in the interest of fairness want to make sure that plaintiff's counsel aren't constantly behind the 8 ball.

And I'm not suggesting they have been or are, but I do

think that some relief under the scheduling order is appropriate, not because of the pending motions. I don't think that they change much. I would say that I'd be interested in each of your perspective as to whether or not the motions to dismiss will be granted, but to me the only factor that may change things is if Shimizu comes into the case, but then I'm not sure to the extent to which that changes it if, as has been suggested all along, Fiber is really a front for Shimizu anyway and it's the same stuff.

But in any event, I am inclined to grant some relief, and the question is how much to give, and I'm happy -- it's certainly not going to be -- we're not going to wait for the district court to render a decision. I'm going to give you 30, 60, 90 days at max, and all of that depends upon -- to the extent that it impacts district court dates, I need to get permission from the district court to adjust that. Permission is probably -- will be forthcoming when I ask for it, but I just need to get a sense as to what is rational here. I don't want the discovery period to go on forever.

And, you know -- and, again, my -- my fear is always that when I either have the initial period or grant an extension that people sit back with a sigh of relief and say oh, good, I can go do all the work for two months. And I intend to the extent I grant you a continuance -- and I am going to grant something -- I intend to do some serious due

diligence during this time, and the likelihood -- I will tell you that I will not extend the date again if it's based upon the pendency of discovery disputes. I'm going to hold that against both of you. If something extraordinary comes up, and sometimes they do, that's a different question. And I have been known to extend discovery deadlines for limited purposes. If, for example, I think we discussed early on -- you weren't there -- whether a deposition in Japan was necessary, the time I think it was clear that Shimizu would not rely upon the international boundary requiring you to go there, embassy time and all that stuff, that can really be a matter of delay, but if something like that happens, I can deal with it.

So with that, you know, in mind, what is a rational time period that we can get these things done barring unforeseen complications?

MR. FITZGERALD: Your Honor, if I may be heard briefly, just on what I mentioned, the primary reason being the substitution of counsel, I just do want to give a little background context.

Even before new counsel substituted in, they were involved in the meet and confer call that we had on September 18th, so it was both -- all counsel, new counsel and us, on the phone.

THE COURT: And I get that, and that seemed pretty clear to me. The notice or I guess the motion was

September 18. It was granted on the 22nd or something like that. I always expect there to be a little transition, but it doesn't change it dramatically.

MR. FITZGERALD: And discovery being pursued up to that time. That was shortly before the expert disclosures were due, and we got our expert disclosure in, and at the time they made their expert disclosure. I don't think that date should be moved retroactively. The disclosures and the -- in terms of extending the date, we want the shortest possible. We feel like we're pretty ready to move forward.

I do want to clarify at the ENE we don't have control over Shimizu or even though we're licensees, we can't force it to do anything. What we said is we will make our best efforts to see if we can facilitate Shimizu's cooperation, but at the end of the day, we can't force it.

THE COURT: I do remember that, but I also remember the next thing which we don't anticipate it being a problem.

MR. FITZGERALD: Okay.

THE COURT: And --

MR. FITZGERALD: And that's --

THE COURT: I don't hold you to that.

MR. FITZGERALD: And I still -- that's still our position.

The second thing is that the Hague Convention via Japan is really easy. They've been elected to do the exception

or something, so you don't actually have to go through everything. They argue in their papers actually in the motion to add Shimizu that it's really only a few weeks. I believe you can just be accomplished in Japan by mailing.

So that being said, they haven't served Shimizu with a subpoena yet except there was a Shimizu in Las Vegas a week or two ago, and they went and served him with a subpoena. Now, whether that subpoena is valid and so forth, we're not conceding that, but they've made an effort to serve Shimizu here in the states. They made no effort to serve Shimizu in Japan. I don't know why. We've got a deadline of December 18th, and they've known this since last April or May. I don't know why they didn't bring the case against Shimizu to start with if they now believe that Shimizu --

THE COURT: In the end we had new counsel as of September, so -- and I do want you to grant some relief and recognizing that some of the decisions that were made before could be revisited.

MR. FITZGERALD: I would just say 30 days is good. We would argue for a minimal --

THE COURT: And I get that because you were in opposition to begin with to your motion.

MR. FLAHERTY: The reason I think 90 days makes sense is because you're going to give us 30 days to produce. The documents are still at issue. The exchange hasn't occurred.

We were -- it was represented to both us and the Court that all production has been made from Fiber. That didn't occur until Friday.

I might note that the purported assignment was a -- and I don't know if there's any other attorneys in the room. The point being we didn't have the opportunity to look at this document and test this document until Friday. There were all kinds of documents that were withheld and weren't given us to until that day, which was after the expert exchange.

Their expert -- maybe they want to rely on the court as is, but it relies on zero independent analyses of their own expert. Our expert opined if he had no documents to be able to make an opinion as to their damages, so the 90 days makes sense because we're going to be exchanging documents for another 30 days. We need an opportunity to give those to the expert and then for them to provide an updated report.

MR. FITZGERALD: Your Honor, that's not --

THE COURT: I'm not granting the continuance because we didn't get everything we were supposed to get. That sort of argument sort of falls on mostly deaf ears.

To me the two reasons for me to continue the deadlines to some extent, one is the entry of new counsel, and I think it's fair; and second is that the dispute regarding how far back in time that aspect of the discovery dispute while I did

find the way it came up weird, I think it's legit, and that is going to require the production, I assume, of more documents. It's a lot or little, I don't know, but the question is how far out to go beyond that.

MR. FITZGERALD: How about 45 days?

THE COURT: No, I'm actually -- to be honest, I'm thinking about 60, and the reason I'm thinking about 60 is for two reasons. One is that there may be as a consequence of whatever this latest exchange of documents takes is going to be some apparent need for additional fact discovery that may not have been apparent before, and I agree with the notion that it may require some updating by the experts, and you're not going to want to depose the experts until they were in a position where you and they believe they have what they're going to get.

MR. FITZGERALD: Your Honor, is that to say that the expert disclosures that have already been made, those reports can be updated, but not new expert disclosures?

THE COURT: Correct. I don't see any need for new experts. It's not new. Although I would say that to the extent that it would have -- it should have happened already. Was there a damage expert disclosure?

MR. FLAHERTY: We designated him.

THE COURT: Okay. And then the other side hasn't received any damages information. Is that fair?

MR. FITZGERALD: And we don't have a damages expert.

THE COURT: You're not going to have one?

MR. FITZGERALD: I'm not going to have one.

THE COURT: Okay. That's fine. So I'm looking at 60 days as fair --

MR. FLAHERTY: If Your Honor would indulge me in that being able to redesignate a liability expert is necessary in our case because we didn't have access to the facts at the time that the designation took place. There's essentially no expert.

THE COURT: Well, it would still be the same. It would still be the same expert. The way it looks to me is that you're not getting any new -- this is -- these are disclosures I've ordered you to provide to the defendants, so how does that change things for you?

MR. FLAHERTY: Well, because the documents didn't get here till Friday. There's a great deal of Fiber Research --

THE COURT: But your expert can certainly -- has the option to do a rebuttal report based upon new information.

MR. FLAHERTY: Correct.

THE COURT: It's not a new designation.

MR. FLAHERTY: Correct.

THE COURT: It's either a supplemental or rebuttal report.

MR. FLAHERTY: Aside from nonretained experts, we didn't have an opportunity to designate a retained expert at

the time of disclosure because effectively there's very few people in the world that can reliably opine -- provide a report based upon the information that we have about this case at the time.

THE COURT: That's a different dispute. I'm not going to rule on that. As it is, what I'm going to do is expand the -- I'll have to get permission from Judge Bashant, but assuming I get it, you can expect the schedule to be extended by about 60 days, whatever -- if she does, she does. The -- I will not order -- I will not provide for new expert disclosure dates; however, if you -- if there is a legitimate issue about that and you can't agree, that's a dispute I'll hear.

MR. FLAHERTY: On papers?

THE COURT: Yes. Either papers or, if I can, I'll bring you in to talk to you, but the notion would be that for whatever reason the -- you need a new expert, I mean that's -- you could try.

MR. FLAHERTY: Thank you.

THE COURT: All right. I think that's covered. Jennifer, how have I done? Got it covered?

MR. FLAHERTY: There remains, I suppose, one issue. Whether it's a housekeeping issue or substantive issue, I don't know. I don't know if it remains pending for your disposition or whether it was an oversight, but our request for the production of documents, our request to compel their documents,

it is my understanding that your order only requested -- or only authorized or compelled the production of that one interrogatory.

THE COURT: The rest of the matters in dispute as I read them unless I missed it, which is possible, all had to do with the fact that you were going to make disclosures once the protective order was in place. The protective order is now in place, so in theory anything that you were withholding, and I thought it was the bulk, all but interrogatory 3 were based -- and if I missed that, I'll go back and look at it again, but it was my impression that interrogatory 3 was the only thing that was independent of a protective order being in place, and once the protective order is in place, there's nothing -- there was no real dispute beyond that.

MR. FLAHERTY: We would ask provided or assuming that Friday's production by Fiber is, in fact, everything and they no longer stand on any of their objections, everything has been properly designated under the protective order, we would ask that they amend their responses and verify such.

THE COURT: This whole verification of responses isn't federal law. That's a state court practice. We don't do it. The fact that a discovery response is sent by the lawyer is verification under the rule. There's no amended verification. Don't confuse state procedure with federal.

MR. FLAHERTY: Apologize.

THE COURT: That's all right. So, again, I don't know the quality of their production. If there's a dispute about the quality of the production -- the rules are the rules -- you meet and confer, figure out what the problem is, resolve it. Or force me to.

MR. FITZGERALD: And I will just say for clarification of the record and to be clear that our document production is complete. We completed it the same day that the protective order was entered. As far as we're concerned, our production is complete. ORI's isn't, but we look forward to receiving it.

THE COURT: That was my impression, that that dispute was simply almost a place keeper with the exception of interrogatory number 3.

MR. FITZGERALD: Thank you.

THE COURT: Anything else then?

MR. FLAHERTY: No, Your Honor. That's it.

THE COURT: I hope not to see you again except at our mandatory settlement conference unless you settle before that, but if I do, I do.

MR. FLAHERTY: All dates are being carried over, correct?

THE COURT: You'll be getting a new scheduling order. I'm trying to get 60 days. I'm not sure how that's going to -- ultimately what -- the discovery date will change for sure. How much slippage you'll see in the district court side remains

to be seen, so I suspect the deadline by which you'll have to bring dispositive motions will change. I suspect as a consequence of that, your pretrial conference date will change. Your anticipated trial date may not change. It just depends upon what the district judge wants to do, and she will let me know, and I'll do the scheduling order.

All right. Anything else? We'll probably move that right now. That's an open question. I do have a mandatory settlement conference set for January. I do that because I try and do it just after the close of discovery before the big pretrial work occurs.

As discovery deadline is going to change, the question to you is whether you still want that date, whether you want me to vacate it and not have one at all because there's no way you're going down that path or whether you want me to set a new mandatory settlement conference date after the close of the new discovery period. Any thoughts?

MR. FITZGERALD: It probably makes sense to set it after -- or to set one after the close of the new discovery period.

THE COURT: All right. So we'll do that. I'll vacate the January 1 and set it for whatever -- just after the close of the new discovery date.

MR. FITZGERALD: Thank you.

MR. FLAHERTY: Thank you.

THE COURT: Thank you all.

THE CLERK: That concludes all matters on this Court's calendar. We are off the record.

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C-E-R-T-I-F-I-C-A-T-I-O-N

I hereby certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Dated November 4, 2015, at San Diego, California.

/s/ Dana Peabody
_____
Dana Peabody,
Transcriber